Supreme Court, U.S.
FILED
JAN 26 2010
OFFICE OF THE CLERK

No. 09-547

IN THE
Supreme Court of the United States

AMERICAN FARM BUREAU FEDERATION,
AMERICAN FOREST & PAPER ASSOCIATION, AND
NATIONAL COTTON COUNCIL,
Petitioners,

v.

BAYKEEPER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

ELLEN STEEN
Counsel of Record
CLIFTON S. ELGARTEN
JESSICA A. HALL
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
(202) 624-2500

Counsel for Petitioners

OF COUNSEL

DANIELLE QUIST
AMERICAN FARM BUREAU FEDERATION
600 Maryland Ave., SW
Suite 1000W
Washington, DC 20024

WILLIAM R. MURRAY
AMERICAN FOREST & PAPER ASSOCIATION
1111 – 19th Street, NW
Suite 800
Washington, DC 20036

WILLIAM A. GILLON
GILLON & ASSOCIATES, PLLC
1163 Halle Park Circle
Collierville, TN 38017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
ARGUMENT 1

TABLE OF AUTHORITIES

Page

Cases

Envtl. Def. Ctr., Inc. v. EPA,
344 F.3d 832 (9th Cir. 2003) 6

Saint John's Organic Farm v. Gem County Mosquito Abatement Dist.,
574 F.3d 1054 (9th Cir. 2009) 10

Waterkeeper Alliance, Inc. v. EPA,
399 F.3d 486 (2d. Cir. 2005) 6

Other Authorities

Statewide General National Pollutant Discharge Elimination System Permit for Pesticides Spray Applications to Waters of the United States to Control Adult Mosquitoes, General Permit No. CAG XXXXXX, available at http://www.waterboards.ca.gov/water_issues/programs/npdes/docs/adulticides/draftpermit4comment.pdf 10

Waterkeepers N. Cal. v. State Water Res. Control Bd., 2001 WL 35909033 (Cal. Super. Ct. No. 2001-022050) (Complaint) 7

ARGUMENT

The Government agrees that the Sixth Circuit erred in ruling that the Clean Water Act ("CWA") unambiguously requires the regulation of pesticide use as the "discharge of a pollutant" and in vacating the 2006 Rule. The Government also agrees that the decision below effectively overturns three decades of consistent EPA practice and does not dispute that it will produce the largest expansion of this regulatory program since its inception. Further, the Government does not dispute that the ability to promptly apply pesticides in response to outbreaks of insects and other pests is essential to the protection of our public health, food supply, and biosecurity.

The Government nonetheless opposes the petition because the court below did not, in terms, purport to override *Chevron*, but merely *misapplied* it. U.S. Br. 12. Further, the Government opines that the stay of the court's mandate until April 2011 "should provide EPA and other authorized permitting agencies sufficient time to develop and issue general CWA permits to cover the activities at issue." *Id.* 16. Thus, the Government sees "no pressing need for this Court's review." *Id.*

Contrary to the Government's suggestion, recitation of the *Chevron* standard ought not insulate from review a decision that on its face disregards *Chevron*'s principal directive. In cases involving review of agency rules, it would be the rare circuit panel that failed to quote (correctly) the *Chevron* standard. The decision below nevertheless conflicts with *Chevron* by rejecting the agency's reasonable interpretation and long-standing practice in favor of the court's *ipse dixit* declaration of the statute's meaning – with scant reference to any of

the traditional tools of statutory interpretation. By articulating an analysis that omits much of what *Chevron* requires, the Sixth Circuit's decision creates harmful precedent every bit as much as a lower court's explicit effort to override *Chevron* (if that can even be imagined).

Beyond the mischief it does to principles of respect for agency interpretation and congressional delegations of authority, the decision below warrants review because it will misallocate resources within an important federal regulatory program, needlessly burden the regulated public, and increase risks to public health and our food supply.

The Government suggests that EPA's anticipated "general permit" will mitigate the administrative burdens resulting from the decision. But general permitting merely makes it *possible* to issue NPDES permits for *some portion* of the affected activities. This does nothing to diminish the importance of a decision that shifts limited resources to the regulation of pesticide use through a program ill-suited to that task – rather than through the programs Congress carefully crafted to address the water quality impact of pesticide use (including non-regulatory CWA programs). *See* AFBF Pet. 4-6.

Moreover, the anticipated EPA general permit will not alleviate the burdens imposed on the *public*. It will not, for example, cover all pesticide uses affected by the decision – instead leaving many with no practical means of obtaining authorization to use pesticides. Nor is there any cause to believe that the 45 cash-strapped *state agencies* responsible for permit issuance will improve upon EPA's effort. Further, as described below, even if EPA- or State-issued permits do authorize a particular pesticide

use, authorization will come with a set of permit conditions so complex, burdensome, and costly as to effectively preclude pesticide use by individuals and small businesses. *See infra* p. 10-11. This Court's review is necessary to avoid the needless imposition of such constraints on activities essential to the protection of our health, crops, and forests.

1. The Government asserts that review is unnecessary because "[t]he court of appeals recited the correct standard under *Chevron* and did not purport to articulate a new analytic framework for review of agency rules." U.S. Br. 12. The Government thus equates rote recitation of the *Chevron* standard with adherence to *Chevron*'s teaching.

Yet it is neither necessary nor sufficient for the court to properly recite the *Chevron* standard. What *is* required is a serious consideration of whether Congress has directly spoken to the precise question at issue – based on examination of the relevant statutory provisions, the broader statutory scheme and context, and other traditional tools of construction. *See* AFBF Pet. 26-28. The Sixth Circuit undertook no such analysis, but simply declared the meaning of the statute to be plain. *See* AFBF App. 24a-25a.

The court *failed entirely* to examine whether EPA's interpretation of the statutory text (*e.g.*, "pollutant . . . from a point source") was plausible (instead finding that the text does not *require* a "temporal" connection between the "pollutant" and the "point source"). AFBF Pet. 22-23. The decision also omits any discussion of statutory and historical context (aside from the general statutory purpose), as well as the agency's contemporaneous and long-

standing practice of not requiring NPDES permits for pesticide use.[1] *See* AFBF Pet. 22-25, 27-28. The Government concedes as much, pointing out that the Sixth Circuit found the statute unambiguous "notwithstanding the Act's silence as to the temporal issue of when such pesticide loses its character as product and becomes a pollutant; EPA's past practice of not requiring permits for such discharges (p. 2, *supra*); and FIFRA's specific regulation of pesticide use (pp. 3-4, *supra*) . . . ." U.S. Br. 11.[2] Such an analysis plainly conflicts with *Chevron*.

2. Respondent Baykeeper finds nothing particularly significant about the expansion of the NPDES program to cover 5.6 million pesticide applications each year by more than 365,000 entities, asserting that prior judicial expansions of the program have been "at least as 'dramatic' as this one." Baykeeper Br. 32-33.[3] While the numbers

---

[1] Baykeeper cites EPA's 1999 amicus brief in *Headwaters v. Talent* to suggest that EPA has historically interpreted the CWA to require permitting for the use of pesticides in water. *See* Baykeeper Br. 3, 27 n.14. This is simply not true. The 1999 amicus brief established no EPA policy concerning the regulation of pesticide use under the CWA. *See* AFBF App. 185a.

[2] The Government's response belies Baykeeper's unsupported assertion that the court "tested" its plain meaning conclusion "against the structure, purpose, and history of the statute." Baykeeper Br. 13.

[3] The Government, for its part, downplays the number of entities affected by referring to "*thousands* of persons and businesses" and "*thousands* of applications." "Thousands" is literally correct only because it literally encompasses the *hundreds of thousands* of people and businesses, and *thousands*

(continued...)

speak for themselves,[4] the importance of the decision below derives not only from the number of activities affected, but also from the diversity of those activities: the use of thousands of chemical and biological products to increase the productivity of forest and crop land, to protect those resources from insect and disease outbreaks, to maintain irrigation and other ditches, to control aquatic weeds and invasive species, and to reduce mosquito populations, among other uses. Never have EPA and authorized States been challenged to quickly implement a mechanism to authorize so diverse a universe of "discharges." Nor have they ever been called upon to apply "best available technology" to minimize and *eliminate* the discharge of a so-called "pollutant" that is in fact a beneficial and often essential product.

(continued)
of thousands of pesticide applications each year that EPA estimates will be affected. *See* AFBF Pet. 16.

[4] The two examples cited by Baykeeper brought into the program some 350,000 and 70,000 facilities, respectively. *See* Baykeeper Br. 33 n.16; AFBF Pet. 15-16. Although Baykeeper suggests that EPA's estimates are "likely to be exaggerated," the true number of affected pesticides users is undoubtedly much larger than EPA's estimates. *See* AFBF Pet. 16; Baykeeper App. 26-28 (EPA explanation of low estimates). In addition to entirely omitting applications to crops, EPA grossly under-estimates (at 4,500) the number of applications on forest lands. A 2006 USDA survey found *928,000* private, non-industrial family forest owners reported applying pesticides to their lands over the previous five years. *See* Butler, Brett J., Family Forest Owners of the United States, 2006, (U.S.D.A., Forest Service, Northern Research Station, June 2008) 65, Table US-22.

3. The Government ignores and Baykeeper mocks (at 4) Petitioners' concern over the public health, food supply, and biosecurity threat posed by the imposition of NPDES restrictions on pesticide use. Yet neither disputes that pesticides play an essential role in the protection of the U.S. food supply and the control of mosquito-borne disease. Instead, Respondents ask the Court to assume that EPA and 45 State agencies[5] will issue general permits to authorize any pesticide use that is important for public health and food production. Such reliance would be misplaced.

a. To trust that general permits will be available for pesticide users, one must assume not only that they will be *issued*, but also that they will be *upheld* in the likely event of judicial challenges. NPDES "general permits" are entirely a product of EPA regulations, with no express statutory authority and a dubious track record in litigation. *See Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 498-500, 503-04 (2d Cir. 2005) (invalidating aspects of EPA rules for general permits for animal feeding operations based on failure to require agency approval and public participation on site-specific control plans); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 852-58 (9th Cir. 2003) (invalidating aspects of EPA rules governing general permits for municipal stormwater discharges for failure to require agency

---

[5] 46 States are authorized to administer the NPDES permitting program. EPA reportedly will serve as the permitting authority for Alaska, however, in addition to the four unauthorized States.

approval and public participation on individual municipalities' pollution control programs).[6]

b. EPA's yet-to-be-proposed general permit will authorize only a small fraction of the newly regulated pesticide applications nationwide. The EPA permit will apply in only five States. In addition, EPA reportedly plans to cover only a finite list of "use patterns," leaving *no permit coverage* – and great vulnerability to litigation and penalties – for any other pesticide use that occurs in any proximity to waters. Moreover, EPA's permit reportedly will *not* authorize pesticide application to, over, or near waters with particularly high or low water quality ("outstanding natural resource" waters or waters identified as not meeting standards). Thus, the permit will not authorize pesticide use in, over, or near such waters *regardless of the human consequences and regardless of the actual environmental impact of the application.*[7]

c. Respondents offer assurances that EPA's general permit may mitigate administrative burdens by serving as a "model" for States to follow. Baykeeper Br. 32; U.S. Br. 15-16. But with or without EPA's "model," administering a permitting

---

[6] Indeed, Baykeeper itself challenged California's "emergency" general permit authorizing certain aquatic pesticide uses in response to the decision in *Headwaters v. Talent*. *See Waterkeepers N. Cal. v. State Water Res. Control Bd.*, 2001 WL 35909033 (Cal. Super. Ct. No. 2001-022050). That lawsuit was settled.

[7] For example, in a remote forested area where pristine waters are present, forest canopy spray to control an outbreak of defoliating gypsy moth would not be authorized.

regime for pesticide use will be – for States that choose to undertake it – a resource intensive and costly process. *See* AFBF App. 147a-161a. Issuing general permits is only the first challenge. Afterwards comes the burden of defending those permits in litigation, processing and reviewing "notices of intent" and other submissions, addressing the need for water quality-based requirements for particular waters, enforcing permit compliance, responding to requests for individual permits where general permit coverage is unavailable, and reissuing each permit every five years in perpetuity.

Neither Respondent suggests that all, or even most, authorized States have begun to develop permits in the year since the decision below. Thus, what is "purely speculative" is not whether food production and disease control will be disrupted by NPDES regulation (Baykeeper Br. 30), but whether 45 States will issue broadly applicable permits authorizing pesticide use in, over, and near waters – let alone that they will do so by April 2011.

Baykeeper touts four States – California, Oregon, Washington, and Nevada – as having implemented NPDES permitting for some aquatic pesticide use prior to the decision below. Baykeeper Br. 31. Yet even these States have only issued permits for narrowly defined uses (*e.g.*, mosquito larvicides (California and Washington) and irrigation ditch/aquatic weed control (California, Nevada, and Washington)). Oregon has no general permit in effect and none proposed. And between them, the remaining three States have only two narrow new draft permits in evidence on their websites (non-native invasive aquatic animals and algae in Washington, and mosquito adulticides in

California). A search (the week of this filing) of the websites of several States likely to have large numbers of affected pesticide users – Florida, Louisiana, and Mississippi – revealed no indication of permit development.[8]

d. Absent this Court's review, anyone needing to apply pesticide in, over, or near "waters of the United States" will be precluded from doing so unless the application is authorized under an EPA- or State-issued NPDES permit. Whether Respondents acknowledge it or not, it is a virtual certainty that thousands of farmers, forest landowners, mosquito control agencies, and others will face the "stark binary choice" (Baykeeper Br. 31) of forgoing pesticide use or risking CWA liability. Mosquito control and wide-area insect and disease control, in particular, will typically be impossible without a release of pesticide "over" waters of the United States.

Some pesticide users who lack a feasible permitting option will attempt to apply in a manner that avoids features that might be deemed waters of the United States. Yet, if there are streams or even ditches in the area, they can only *lower* the risk of enforcement by the government or citizens alleging that pesticides have fallen into "waters" as a result of the application. Such claims carry potential penalties of up to $37,500 per violation per day. Those who opt to settle rather than incur the cost of litigation and the risk of an adverse decision,

---

[8] *See* http://www.dep.state.fl.us/water/permits.htm; http://www.deq.state.la.us/portal/tabid/243/Default.aspx; and http://www.deq.state.ms.us/MDEQ.nsf/page/epd_epdgeneral.

moreover, will typically be required to pay plaintiff's attorneys' fees regardless of their good-faith efforts to comply with the law. *See Saint John's Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054, 1062 (9th Cir. 2009) (fee awards "should be the rule rather than the exception" for "prevailing" plaintiff achieving settlement of CWA claims).

e. Those whose pesticide uses *are* addressed in EPA- or State-issued NPDES permits will be only marginally better off – operating under a paperwork intensive, technically complex, and costly regulatory regime. Notwithstanding Baykeeper's remark that "permitting should be relatively easy," Baykeeper Br. 32, "easy" is not an adjective commonly applied to NPDES permitting. *See* Brief of Members of Congress as *Amici Curiae* Supporting Petitioners 15-19 (describing the complexity of general permit compliance and detailing the requirements of Washington's aquatic pesticide permits).

California's current draft general permit for adult mosquito control, for example, is *90 pages long*.[9] The draft would require pesticide users to submit and comply with a Pesticides Application Plan ("PAP") with elements including:

---

[9] *See* Statewide General National Pollutant Discharge Elimination System Permit for Pesticides Spray Applications to Waters of the United States to Control Adult Mosquitoes, General Permit No. CAG XXXXXX, available at http://www.waterboards.ca.gov/water_issues/programs/npdes/docs/adulticides/draftpermit4comment.pdf.

(1) a "discussion of the factors influencing the decision to select spray applications";

(2) the types of pesticides used and methods of application;

(3) "other control methods used (alternatives) and what their limitations are";

(4) "how much product is needed and how this is determined";

(5) a monitoring plan;

(6) an "off-target drift management plan";

(7) an "evaluation of available [best management practices ("BMPs")] to determine if there are feasible alternatives to the selected pesticide application project that could reduce potential water quality impacts"; and

(8) a description of BMPs to be implemented.

Id. § VIII.E. Permittees would be required to maintain logs of each pesticide application, including the date, location, name of applicator, time application started and stopped, application rate and concentration, wind speed and direction, vehicle speed, and "visual monitoring assessment", among other details. *Id.* § VIII.F. Landowners or other applicators who fail to comply with any such permit requirements (notwithstanding their good faith efforts) will be subject to civil penalties of up to $37,500 per violation. *See* AFBF Pet. 4.

4. Baykeeper alone – not the Government – suggests that Petitioners' concerns about the impact on crop protection are unfounded because "terrestrial (land-based) pesticide applications [are]

outside the scope of this opinion." Baykeeper Br. 4 (arguing the decision reaches only "aquatic" pesticides). As the Government seems to recognize, the Sixth Circuit's opinion is not so limited. Indeed, the 2006 Rule itself offered an "example" of a covered *non-aquatic* application: "when insecticides are *aerially applied to a forest canopy where waters of the United States may be present below the canopy*." AFBF Pet. App. 111a (emphasis added).[10]

Given that application of pesticides to forests was within the scope of the Rule (and particularly in light of the Sixth Circuit's "but for" test), it is reasonable to conclude that EPA will find itself constrained to deem agricultural pesticide use a "point source" discharge if pesticide (in any amount) falls directly into waters of the United States. There is no question that this occurs, particularly where water-dependent crops (such as rice and cranberries) are grown *within* "waters of the United States" – or where the very *irrigation ditches* running within and among a farmer's fields are deemed to be "waters of the United States." Although neither Petitioners nor Respondents know *how many* farmers will be

---

[10] Baykeeper is certainly correct that the CWA exempts agricultural *stormwater* and irrigation return flows. Baykeeper Br. 20-21. But there is no explicit statutory exemption for pesticide that simply falls into waters during use – presumably because Congress never imagined pesticide use would be viewed as a "discharge of a pollutant" under any circumstances. Nevertheless, Petitioners certainly will continue to contend that the application of pesticide to crops, and to forests for that matter, *should* be viewed as a "nonpoint source" regardless of the deposition of pesticide into waters, based on Congress's clear intent not to require CWA permits for agricultural and silvicultural activities.

affected, it is implausible to suggest that crop protection is not threatened by the Sixth Circuit's ruling.

Respectfully submitted,

Ellen Steen
Counsel of Record
Clifton S. Elgarten
Jessica A. Hall
CROWELL & MORING LLP
1001 Pennsylvania Ave. NW
Washington, DC 20004-2595
(202) 624-2500

January 2010